



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - :

Detective Erick Flores :

Tax Registry No. 943243 :

Military & Extended Leave Desk :

FINAL

ORDER

OF

DISMISSAL
-----X

Detective Erick Flores, Tax Registry No. 943243, having been served with written notice, has been tried on written Charges and Specifications numbered 2021-23887, as set forth on form P.D. 468-121, dated August 23, 2021, and after a review of the entire record, Respondent is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Detective Erick Flores from the Police Service of the City of New York.


KEECHANT L. SEWELL
POLICE COMMISSIONER

EFFECTIVE: 4/14/22



POLICE DEPARTMENT

March 17, 2022

-----X
In the Matter of the Charges and Specifications :

- against - :

Detective Erick Flores :

Tax Registry No. 943243 :

Military & Extended Leave Desk :

Case No.

2021-23887

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Javier Seymore. Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Marissa Gillespie, Esq.
Karasyk & Moschella, LLP
233 Broadway, Suite 2340
New York, NY 10279

To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Detective Erick Flores, assigned to Narcotics Borough Brooklyn South, on or about and between September 10, 2020 and August 10, 2021, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Detective Flores wrongfully ingested Marijuana and/or cannabinoids without police necessity or authority to do so.

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT

P.G. 205-32

PERSONNEL MATTERS

2. Detective Erick Flores, assigned to Narcotics Borough Brooklyn South, on or about and between September 10, 2020 and August 10, 2021, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Detective Flores wrongfully possessed Marijuana and/or cannabinoids without police necessity or authority to do so.

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT

P.G. 205-32

PERSONNEL MATTERS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on February 1 and 23, 2022. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Dr. Ryan Paulsen and Police Officer Danny Tse as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty of the charged misconduct, and recommend that he be DISMISSED from the New York City Police Department.

ANALYSIS

On August 10, 2021, Respondent appeared at the Department's Medical Division in order to provide hair and urine samples as part of a random drug test. Once collected, two of the hair samples were forwarded to the Psychomedics Lab in California for testing. It is alleged that

those two samples both tested positive for marijuana. Additionally, a third hair sample was sent to Quest Diagnostics in Kansas for testing; it is alleged that the third sample also tested positive for marijuana. Based on these results, Respondent is charged with wrongfully possessing and ingesting marijuana.

Police Officer Danny Tse, who is assigned to the Drug Screening Unit of the Medical Division, testified that he collects approximately 500 hair samples per year. Although he had no specific recollection of his interaction with Respondent on August 10, 2021, from his review of the discovery package he was able to describe how he took hair samples from Respondent that day. (Tr. 107, 110, 140, 142)

Before taking the samples, Tse followed some preliminary procedures. After verifying Respondent's identity, he had Respondent fill out a Drug Screening Questionnaire (Dept. Ex. 3). In that questionnaire, Respondent indicated that he had not taken any prescription medications in the past three months. Respondent chose to have the hair samples taken from his leg, and Tse, who was wearing gloves, used a new razor to collect the samples. Tse testified that in Respondent's presence, he divided the shaved hair samples into three parts, which he placed into three foils. He then placed the foils into three separate "sample acquisition envelopes," which he sealed and had Respondent sign. Tse secured the three samples in a locker, which he recorded on the Temporary Storage Log (Dept. Ex. 4). That evening, the A and B samples were prepared for FedEx delivery to Psychomedics (see Specimen Transmittal Report, Dept. Ex. 5), while the third sample remained in the safekeeping locker until, at Respondent's request, it was sent to Quest for testing. (Tr. 110-114, 119-37, 143-44)

Dr. Ryan Paulsen, a Senior Analytical Chemist for Mass Spectrometry at Psychomedics, testified as an expert in forensic toxicology and hair-testing. He stated that the NYPD has a

contract with Psychemedics, whereby the Department forwards samples to the lab to be tested for drugs. Psychemedics has tested millions of samples, submitted by the NYPD and other clients. (Tr. 18, 22, 67)

One of the drugs the lab tests for is marijuana. Dr. Paulsen, who has been with Psychemedics since 2014, testified that after marijuana is ingested into the body, through smoking or other means, it enters the bloodstream. Tetrahydrocannabinol (“THC”), the active ingredient in marijuana, is metabolized into carboxy-THC. Once the carboxy-THC enters the bloodstream, it interacts with a person’s hair at its root; as the hair grows out, the drug will remain incorporated in the hair shaft. Samples of a person’s hair can then be tested for the presence of carboxy-THC, which would indicate that marijuana had been ingested. In the case of hair samples taken from a person’s leg, carboxy-THC can generally remain trapped in the hair for approximately six months after ingestion. (Tr. 22-27, 38)

Dr. Paulsen explained the general process whereby samples that are received at the lab are tested. Upon receipt, the lab checks that the sample packages are intact, and they each are assigned an accession number for tracking. Preliminarily, an immunoassay screening is done on a portion of the first sample (“Sample A”); if that test produces a negative result, no further testing is done. However, if the test yields a presumptive positive result, then the lab performs additional confirmation tests. (Tr. 28-29, 32, 47-51)

A separate portion from Sample A is prepared for testing. This portion first undergoes an extensive wash procedure in order to remove surface contamination from the hair, so that the test result will only reflect the presence of ingested marijuana. The hair then is analyzed through mass spectrometry, a technique used to identify the presence of a drug, and the amount of the drug. If the test reveals the presence of of carboxy-THC in the amount of 1 picogram per 10

milligrams of hair or higher, the result is considered positive for marijuana. Dr. Paulsen testified that the 1.0 threshold is FDA approved and is considered a conservative cutoff point, which indicates the regular use of marijuana, as opposed to someone with inadvertent exposure. (Tr. 30-35, 71, 84-87)

If the test result is under 1.0 picograms, the result is negative and no additional testing is done. However, if the result is positive, a portion of hair from a second sample ("Sample B") is washed and then tested with mass spectrometry. Dr. Paulsen testified that if that test also yields a result of 1.0 picograms or higher, the lab reports a positive result for the ingestion of marijuana. (Tr. 33-34, 37-38)

For this case, the Laboratory Data Package for the testing of Respondent's samples by Psychemedics was introduced into evidence as Dept. Ex. 1. From his review of the report, Dr. Paulsen testified that the preliminary immunoassay screening yielded a positive result, and therefore additional tests were performed on Respondent's samples. The test of Sample A indicated the presence of 1.2 picograms of carboxy-THC, while the test of Sample B yielded a result of 1.4, both positive for marijuana. (Tr. 49, 52-58, 70)

According to Dr. Paulsen, the test results from Psychemedics indicate that marijuana, in some form, was ingested by Respondent, on multiple occasions, during the six months preceding the sample collection. Not only were the readings not consistent with one-time accidental use, they also cannot be explained by Respondent coming into close physical contact with marijuana. Dr. Paulsen testified that if Respondent had merely inhaled secondhand smoke, it would not yield readings that would reach the 1.0 cutoff. If marijuana were transferred externally to Respondent, from being in close proximity to someone else who was smoking, or through physical contact with that person, the amount transferred would be "easily washed off" by the

lab's wash procedure. Similarly, if Respondent were to have handled marijuana directly, or touched objects with marijuana on them, that sort of "incidental exposure" would not yield the positive readings in this case. Dr. Paulsen explained that skin is a "pretty good barrier" against absorbing marijuana into a person's bloodstream in this way, unless a person were using a transdermal delivery device such as a nicotine patch. If some marijuana were actually absorbed through Respondent's skin from handling the substance, it would produce only trace amounts of carboxy-THC, and not result in readings that would reach the 1.0 cutoff. (Tr. 35-36, 65-66, 72-91)

The third sample, Sample C, was sent to Quest Diagnostics, a lab located in Kansas, to be tested for marijuana. A copy of the certified documentation package from Quest was introduced into evidence as Dept. Ex. 2. From his review of the documents, Dr. Paulsen testified that the result of the Quest test was 1.6 picograms. As such, the Quest result was not inconsistent with the results reached by Psychemedics. Dr. Paulsen acknowledged, though, that he has never been employed by Quest, that they use a different numbering system than Psychemedics, and that he is not intimately familiar with the Quest procedures that produced the 1.6 reading. (Tr. 59-64, 71-72)

Respondent testified that in his 15 years with the Department, he has never knowingly ingested marijuana. Specifically, he did not knowingly smoke or vape marijuana, or eat gummies or any food containing marijuana. He has no idea how he tested positive, insisting that he would not have put himself in this position. Respondent noted that he had similarly been drug tested four or five times previously, and none of those results were positive. (Tr. 170-76, 182)

By way of possible explanation for the positive test results, Respondent testified that at the time he was tested, he was assigned to the Violent Crime Squad within the Narcotics

Division. As part of his responsibilities, he was tasked with vouchering property in many marijuana cases. He personally handled marijuana and money, without wearing gloves or a mask. Respondent acknowledged, however, that one of his prior random drug tests occurred while he was assigned to the Narcotics Bureau, and that test did not yield a positive result even though he similarly handled drugs and money. Respondent also noted that he often eats out in the neighborhoods where he works, and since many people do not like the police, someone might have put something in his food. He stated that he has not been in a social environment where the people he was with were consuming edibles or gummies, or smoking marijuana in his presence. (Tr. 160, 164-66, 172-81)

Specifications 1 and 2 charge Respondent with wrongfully ingesting and possessing marijuana.¹ Based on the totality of the credible evidence presented at trial, I find that the Department Advocate has proven Respondent's guilt on each of the two charges.

Officer Tse testified credibly about how he collected the hair samples from Respondent's leg on August 10, 2021. After verifying Respondent's identity, he followed the standard procedures, using a new razor to shave hair from Respondent's leg, and dividing the hair samples into three packages for testing. Although Tse testified primarily based on his review of the records as opposed to his independent recollection, there was nothing in his testimony that cast any doubt on the integrity of the sample collection process here, or in the handling of the evidence as it was packaged and sent to the Psychomedics and Quest labs to be tested.

Doctor Paulsen, an expert in forensic toxicology and hair-testing, testified credibly about the testing of Respondent's hair samples, and the implications of the results. He provided

¹ Although the Charges and Specifications provide for a time range of September 10, 2020 through August 10, 2021 (the date of the test), Dr. Paulsen testified that the typical lookback period for marijuana ingestion, where the hair sample is taken from an individual's leg, is approximately six months, which would mean a timeframe of approximately February 10, 2021 through August 10, 2021.

background information on the reliability of the process itself: he testified about the conservative nature of the 1 picogram per 10 milligrams cutoff level, and convincingly explained how test results for carboxy-THC above that cutoff point reveal multiple occasions of marijuana ingestion, as opposed to one-time or passive exposure.

In this case, the test of Sample A revealed 1.2 picograms of carboxy-THC. The test of Sample B was similarly positive, yielding a result of 1.4. Dr. Paulsen credible testified that these results indicate that Respondent ingested marijuana, on multiple occasions, in the months leading up to the test. Although Dr. Paulsen's lab was not involved in the testing of Sample C, which was tested by Quest Diagnostics, the reports from that lab indicated a positive result as well, which Dr. Paulsen testified was not inconsistent with the results from Psychemedics.

In the face of such credible evidence, this tribunal cannot credit Respondent's self-serving claim that he never knowingly ingested marijuana. His suggestion that he may have tested positive due to his handling of marijuana and money that he was vouchering was unpersuasive. As Dr. Paulsen explained, incidental exposure of that kind would not yield the positive results in this case. Skin is a barrier against such absorption, and unless a person were using a transdermal delivery device such as a nicotine patch, marijuana could not be absorbed into the bloodstream in an amount that would produce the levels of carboxy-THC found in Respondent's hair.

Similarly unpersuasive was Respondent's suggestion that someone may have secretly placed marijuana in his food. Dr. Paulsen noted that there would need to have been "a lot of accidents" of this kind to produce the test results present here. Respondent offered no specific information as to when something like that might have occurred even once, let alone with the frequency required to reach the carboxy-THC levels present here.

As such, the record has established, by a preponderance of the credible evidence, that Respondent wrongfully possessed and ingested marijuana. Accordingly, I find Respondent guilty of Specifications 1 and 2.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history also was examined. *See* 38 RCNY § 15-07. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on January 10, 2007, has been found guilty of ingesting and possessing marijuana. The Department Advocate, noting the Department's "zero tolerance" in marijuana cases, recommends that Respondent's employment be terminated.

The NYPD is a drug-free workplace, and its employees are prohibited from using controlled substances. The Disciplinary Guidelines provide that the presumptive penalty for having a positive test result for use of a Schedule I drug, such as marijuana, is Termination. Taking into account the totality of the facts and circumstances in this matter, I recommend that Respondent be DISMISSED from the New York City Police Department.

APPROVED
APR 14 2022

KEECHANT L. SEWELL
POLICE COMMISSIONER

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials